

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.

HILLSBOROUGH COUNTY SUPERIOR COURT - NORTH
STATE OF NEW HAMPSHIRE

V.

ADAM MONTGOMERY

216-2022-CR-577

MOTION TO PRECLUDE TESTIMONY OF KAYLA MONTGOMERY

NOW COMES the defendant, Adam Montgomery, by and through counsel, Caroline L. Smith, Esq., and respectfully requests this Honorable Court preclude the testimony of Kayla Montgomery at trial as a remedy for the State's discovery violation. The delayed disclosure of statements in the State's possession for four months profoundly prejudices Mr. Montgomery and violates NH Rules of Criminal Procedure 12(b)(7) as well as Mr. Montgomery's right to a fair trial and due process guaranteed by Part 1, Article 15 of the New Hampshire Constitution.

1. Adam Montgomery is charged with multiple counts of Armed Career Criminal, with lesser included counts of Felon in Possession, as well as two counts of Receiving Stolen Property and alternative counts of Theft (hereinafter referred to as the gun charges).

2. Mr. Montgomery was originally charged by complaint on April 4, 2022. Counsel was appointed the following day. Mr. Montgomery was already facing charges in this Court for Second Degree Assault, Endangering the Welfare of a Child, and Interference with Custody from January 2022. The Second Degree Assault charge had been brought by complaint in January and was indicted in March 2022.

3. On or about April 21, 2022, the State provided defense counsel approximately 78 pages of discovery and numerous CDs of witness interviews and Facebook messages regarding the gun charges. This was in addition to hundreds of pages of discovery and multiple CDs received on the original January charges.

4. Mr. Montgomery was subsequently indicted on the gun charges on June 21, 2022.

5. A Dispositional Conference was held in both pending matters on June 28, 2022. At that time, the State elected to proceed to trial first on the gun charges. Jury Selection was scheduled for November 9, 2022, with the notation that trial was preferred the week of November 14, 2022. A deadline of August 3, 2022 was set for Suppression issues on both the gun case and the January

charges. A Motion in Limine deadline for the gun charges was set for 15 days before the final pretrial conference scheduled for October 27, 2022.

6. The State sent additional discovery in the form of documents and CDs in July, August, and September.

7. Mr. Montgomery was again indicted on the Armed Career Criminal and Felon in Possession charges on August 22, 2022. The new indictments read the same as the prior indictments, except that the new ones included additional prior convictions to support the status element.

8. On September 7, 2022, a status conference was held which included discussion of the upcoming hearing on pending motions. While the defendant was not present at the conference, defense counsel asserted Mr. Montgomery's right to speedy trial with regard to the November trial. On September 28, 2022, a hearing was held on pending motions.

9. On Friday, October 7, 2022, the deadline for the State's witness list, the State sent defense counsel, at 4:48 p.m., criminal records for its witnesses and CD 27. The State's witness list was also filed that day.

10. Although Monday, October 10 was a holiday, both defense counsel were in the office working on the Motions in Limine due October 12, 2022. They were able to download the discovery sent by the State and listen to CD 27. The CD contained a new statement made by Kayla Montgomery on **June 3**, 2022.

11. Prior to receipt of CD 27, defense counsel had received statements and transcripts of Ms. Montgomery regarding her purported knowledge of the guns at issue in this case and were prepared to cross-examine her at trial. Her statements of June 3, 2022, however, completely changed the landscape of the gun cases.

12. The State had the June 3, 2022 statement at the time of the Dispositional Conference on June 26 when it requested that the gun charges be tried first and trial was scheduled for November 2022. However, they did not provide the statement to the defense.

13. Nor did the State take any action to disclose the June 3, 2022 statement at the Status Conference held September 7, 2022, where, in response to a question by the Court, defense counsel asserted speedy trial on behalf of the defendant and indicated that defense counsel intended to proceed with trial as scheduled. Nor was there a disclosure of the statement at the September 28, 2022 hearing.

14. It is true the State did not possess the June 3, 2022 statement when this case commenced and the original package of discovery was sent. However, NH Rule of Criminal Procedure 12(b)(7) provides for a continuing duty to disclose discovery information on a timely basis as material is generated.

15. The delayed disclosure of more than four months by the State and on the eve of the parties' deadline for Motions in Limine, a time when trial strategy has generally crystallized, is profoundly prejudicial and violates Mr. Montgomery's rights to due process and to a fair trial as guaranteed by Part 1, Article 15 of the NH Constitution.

16. The discovery rules outlined in the NH Rules of Criminal Procedure are set in part to ensure a fair trial and due process. The prejudice caused by the State's disregard for its discovery obligations cannot be overstated. This case is too close to trial to have the landscape change so dramatically when the State has had the statement for four months. The only appropriate remedy for this violation is to preclude Kayla Montgomery from testifying at the trial in the above-captioned matter. See State v. Cotell, 143 N.H. 275, 281-282 (1998) (While courts should refrain from dismissing charges for discovery violations, "they should not hesitate to impose proportionate and meaningful sanctions to remedy a prosecutor's failure to comply with a discovery order".)

WHEREFORE, Adam Montgomery respectfully requests this Honorable Court:

- A. Grant the defendant's request and preclude the testimony of Kayla Montgomery at trial;
- or
- B. Hold a hearing on this Motion if necessary; and
- C. Grant any other relief this Court deems just and proper.

Respectfully submitted,

/s/ Caroline L. Smith
Caroline L. Smith, Esq.
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CERTIFICATE OF SERVICE:

I hereby certify that a copy of this has been forwarded to the Office of the Attorney General on this 14th day of October 2022.

/s/ Caroline L. Smith
Caroline L. Smith, Esq.